United States Court of Appeals for the Ninth Circuit

IFORNIA ELECTRIC POWER CO., *Petitioner*

v.

ERAL POWER COMMISSION, *Respondent*

---

ition for Review of the Federal Power Commission

FOR THE UNITED STATES AS INTERVENOR

HOLMES BALDRIDGE,
Assistant Attorney General.

PAUL A. SWEENEY,
MELVIN RICHTER,
T. S. L. PERLMAN,
Attorneys, Department of Justice.

GOODWIN,
nsel.

SPIEGEL,
stant Counsel,
Bureau of Yards and Docks,
Department of the Navy.

CITATIONS

STATUTES:

United States Court of Appeals for the Ninth Circuit

No. 12987

FORNIA ELECTRIC POWER CO., *Petitioner*

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ion for Review of the Federal Power Commission

OR THE UNITED STATES AS INTERVENOR

STATEMENT

s petition for review filed under Section the Federal Power Act (49 Stat. 838, 860, 823(b)), petitioner seeks review of an order eral Power Commission applying certain re- s of the Act to petitioner's rates for electric ich it sells to the United States through the reau of Yards and Docks, Department of the use and resale at the Naval Ammunition awthorne, Nevada, as well as to Mineral

support of the Commission's order, will be c
those aspects of the order relating to petition
to the Naval Ammunition Depot.

Petitioner owns and operates an inter
system for the generation and distribution o
power in California and Nevada (R. 85, 174-1
power sold to the Navy (and to Mineral C
generated in and transmitted from petitio
called Northern Division plants in California
The electric energy sold to the Navy is del
Navy-owned transmission lines and metered
tioner's Mill Creek plant substation in Mon
California (R. 86, 104, 190-197). From ther
through the Navy-owned transmission lines a
California-Nevada state boundary to the Na
at Hawthorne.

The electric energy which is delivered to
(and to Mineral County) at Mill Creek is
from three sources. Most of it comes from pe
three plants in its so-called Mono Basin sy
Poole, Rush Creek, and Mill Creek plants. I
Rush Creek transmit power to petitioner's
Leevining substation, whence it flows over a 5
transmission line to the Mill Creek substatio
it is delivered to the Navy and Mineral County
107). The output of the Mill Creek plant is
livered at the Mill Creek substation. The th
Basin plants are all hydroelectric projects lic
the Federal Power Commission under Sectio
Part I of the Federal Power Act (41 Stat

7% of the energy supplied to the Navy and to County originated in these three plants (R. 86,

se times of year when the output at Mono insufficient to meet the needs of the Navy and County, the remainder is supplied from two irces: (1) energy purchased by petitioners Owens River plants of the City of Los Angeles interconnected with petitioner's main 110,000 hern Division transmission line, running from Creek to Leevining substation; (2) energy l at five hydroelectric plants owned by peti- Inyo County, California, known as the Bishop nts, four of which are operated under licenses the Power Commission. The flow is from reek over the 110,000 volt main transmission eevining substation, a distance of about 60 d from Leevining over the 55,000 volt line to ry point at Mill Creek. In 1949 about 10.7% rgy supplied to the Navy and Mineral County m the Owens River source and about 4.6% Bishop Creek plants (R. 86, 190-222, 333-349). st of the energy sold to the Navy flows over) volt line from Leevining to Mill Creek, and t flows through the sixty mile main transmis- from Bishop Creek to Leevining (R. 107,

itching facilities at Mill Creek are owned by (R. 86, 107, 190-197). The Navy and Mineral

County each owns a 33,000 volt transmission
Mill Creek to its own distribution points in
(R. 86, 107, 182). At Hawthorne, the energy
formed to lower voltages for distribution (R.
In addition to the electric energy purchased f
titioner, the Navy generates a small part o
needs on three diesel generators located at t
Depot. In 1949 the amount of power so gene
equivalent to 7.5% of the power purchased f
tioner (R. 89-90).

The power purchased or generated by the
used to supply the electric energy needs of
pants of a housing project, which was built f
occupied by civilian employees of the Depot
the energy needs of the operators of the Dep
ous concessions. In addition, it is used to op
Navy's various facilities at the Depot. Each h
business unit has a separate meter, and the
thereof is billed, and required to pay, for th
which he consumes (R. 90, 270-279, 539-554
1943 to 1949 between 15.4% and 28.6% of th
yearly total power supply was resold to these
and business concessions, the amount resold
the average 18.7% of the yearly total (R. 87,
561).

By a contract, dated July 1, 1943, which
terminable on sixty days' notice, petitioner
Navy agreed upon the rates to be charged
electric energy furnished by petitioner (R. 89

Commission of California, seeking a rate in-
respect of certain designated customers whom
was serving under special contracts (R. 90,
4). The California Commission conducted a
which resulted, in July, 1948, in a decision
rate increases under petitioner's various
(R. 167, 412-509). Among them was so-called
e P-2—Power—Wholesale General Service"
85), which schedule petitioner at this time
apply to the Navy. Invoking its sixty-day
on provision, petitioner attempted to ter-
s contract with the Navy. It continued to
wer, but sought to bill the Navy at the rates
in the new P-2 schedule (R. 90, 307, 558-560).
Navy denied that this new P-2 schedule was
e to the sales to it on the ground, among
at the California Commission lacked jurisdic-
the rates for these sales (R. 90, 7-8), peti-
August, 1949, applied to the California Com-
or a determination that the P-2 schedule was
e to these sales.
plication was pending for hearing when the
mmission instituted the present proceeding
. The Power Commission and the California
on agreed on a joint hearing, in accordance
s of the Power Commission (R. 7-8, 91). After
t hearing, at which staff counsel of both Com-
as well as the petitioner were represented, and
Mineral County and the Navy intervened as

directed petitioner to file the 1945 contract
schedule and to charge the rate there specifi
and unless * * * duly superseded'' by new ra
the Company might file in accordance with
mission's Rules and Regulations (R. 84-11
tioner, on June 21, 1951, after denial of its a
for rehearing (R. 113-144, 146-148), filed thi
for review (R. 623-646). The United States,
of the Navy, and Mineral County moved to
and this Court has granted these motions (R

QUESTIONS PRESENTED

Basically, the issue presented by this case i
the Federal Power Commission has juris
regulate the rates charged by petitioner for t
of electric energy to the Navy.

Specifically, the questions are:

1. Whether the Power Commission has ju
to regulate these sales under Section 20 of
the Federal Power Act (relating to licensee
ground that the energy is sold in interstate
and that the two states involved have been ''
agree'', within the meaning of Section 20,
regulation of the rates for these sales.

2. Whether these sales are sales for resale
state commerce, subject to the Power Com
rate regulation jurisdiction under Sections 20
of Part II of the Federal Power Act re
''public utilities.''

egulation under Part II, by virtue of the fact
ioner is a licensee subject to regulation by
under Section 20.

STATUTES INVOLVED

ovisions of Part I of the Federal Power Act
ely involved are as follows:

c. 20. That when said power or any part
of shall enter into interstate or foreign com-
e the rates charged and the service rendered
ny such licensee, * * * or by any person, cor-
ion, or association purchasing power from
licensee for sale and distribution or use in
c service shall be reasonable, nondiscrimina-
and just to the customer * * * and whenever
of the States directly concerned has not pro-
l a commission or other authority to enforce
equirements of this section within such State
or such States are unable to agree through
properly constituted authorities on the ser-
to be rendered or on the rates or charges of
nent therefor, * * * jurisdiction is hereby con-
d upon the commission * * * upon its own
ative to enforce the provisions of this section,
gulate and control so much of the services ren-
d, and of the rates and charges of payment
efor as constitute interstate or foreign com-
e * * *.

rovisions of Part II of the Power Act im-

for ultimate distribution to the public
with a public interest, and that Federal
of matters relating to generation to the e
vided in this Part and the Part next foll
of that part of such business which cons
transmission of electric energy in inter
merce and the sale of such energy at wh
interstate commerce is necessary in the
terest, such Federal regulation, however,
only to those matters which are not
regulation by the States.

(b) The provisions of this Part shal
the transmission of electric energy in
commerce and to the sale of electric
wholesale in interstate commerce, but
apply to any other sale of electric ene
prive a State or State commission of
authority now exercised over the expo
hydroelectric energy which is transmitte
State line. The Commission shall have ju
over all facilities for such transmission
electric energy, but shall not have ju
except as specifically provided in this Pa
Part next following, over facilities use
generation of electric energy or over faci
in local distribution or only for the trans
electric energy in intrastate commerce
facilities for the transmission of electr
consumed wholly by the transmitter.

commerce if transmitted from a State and
umed at any point outside thereof; but only in-
as such transmission takes place within the
ed States.

) The term "sale of electric energy at whole-
" when used in this Part means a sale of
ric energy to any person for resale.

) The term "public utility" when used in this
or in the Part next following means any
on who owns or operates facilities subject to
urisdiction of the Commission under this Part.

) No provision in this Part shall apply to, or
eemed to include, the United States, a State
ny political subdivision of a State, or any
cy, authority, or instrumentality of any one
ore of the foregoing, or any corporation which
olly owned, directly or indirectly, by any one
ore of the foregoing, or any officer, agent, or
oyee of any of the foregoing acting as such in
ourse of his official duty, unless such provision
es specific reference thereto.

c. 205. (a) All rates and charges made, de-
ded, or received by any public utility for or in
ection with the transmission or sale of electric
gy subject to the jurisdiction of the Commis-
and all rules and regulations affecting or per-
ng to such rates or charges shall be just and
onable, * * *.

(c) * * * every public utility shall file
Commission, * * * schedules showing all r
charges for any transmission or sale subje
jurisdiction of the Commission, * * * .

(d) Unless the Commission otherwise o
change shall be made by any public utilit
such rate, charge, classification, or servi
any rule, regulation, or contract relating
except after thirty days' notice to the Co
and to the public. * * *

SEC. 206. (a) Whenever the Commissi
a hearing had upon its own motion or u
plaint, shall find that any rate, charge, c
fication, demanded, observed, charged, or
by any public utility for any transmissio
subject to the jurisdiction of the Commi
that any rule, regulation, practice, or
affecting such rate, charge, or classificati
just, unreasonable, unduly discrimina
preferential, the Commission shall deter
just and reasonable rate, charge, class
rule, regulation, practice, or contract to
after observed and in force, and shall fix
by order.

ARGUMENT

It is our position that the Power Commis
jurisdiction in this case under both Part I and
of the Federal Power Act to regulate the rates
by petitioner for its sales to the Navy. Jur

is derived from the Federal Water Power Act
Act of June 10, 1920, c. 285, 41 Stat. 1063.
, which dealt with the granting of licenses to
enterprises for the construction and main-
f hydroelectric projects on public lands and
waters, imposed various requirements on the
s a condition of the grant. One of these re-
ts was that the sale of the power generated
projects be subject to rate regulation under
19 and 20. These Sections left the rate regu-
re prescribed to the states, but went on to pro-
in the event that the states concerned should
fford adequate regulation, regulation should
Power Commission. Section 20 deals with
energy sold in interstate commerce, and is
the section here involved. The basic scheme
ection is to permit joint regulation by agree-
ong the states concerned if they are able to
reement. If, however, any of the states con-
ails to provide regulatory machinery or,
rovided such machinery, is unable to reach an
y operating agreement with the other states
d, jurisdiction is conferred on the Federal
ommission.

instant case, the Federal Power Commission
t the power which petitioner generates at
projects and which it sells to the Navy is sold
tate commerce. In addition, the Commission
at Nevada has failed to provide a commission

with the California commission. We belie
rulings to be correct and consequently that th
Commission properly concluded that it had
tion over these rates under Part I of the Ac
I, *infra,* develops our position in detail.

We also think that, aside from the question
diction under Part I, Sections 205 and 206 of
confer rate regulatory jurisdiction on the Pow
mission. Part II was enacted in 1935 as Ti
the Public Utilities Act of 1935. Act of A
1935, c. 687, Title II, 49 Stat. 837, 847. Par
ceeded under a scheme different from tha
Federal Water Power Act, which, as amended
enacted as Part I of the Federal Power Act.
was aimed at regulation of the transmission
at wholesale of electricity in interstate comme
out reference to the manner of its generatio
Part was not intended to oust the states of the
tion, which the Supreme Court had held th
exercise until forbidden by Congress, to reg
rates for retail sales of electricity, even though
state commerce. *Pennsylvania Gas Co.* v
Service Commission, 252 U.S. 23. But other
of the Supreme Court had made it clear that,
of the commerce clause of the Constitution an
less of congressional inaction, the states were
authority to regulate wholesale sales of e
interstate commerce (*Public Utilities Comm
Attleboro Co.,* 273 U.S. 83; *Missouri* v. *Kansas*

interstate sales in the Federal Power Com-

instant case, the Power Commission has held
ieve properly—that petitioner's sales to the
re wholesale sales (sales for resale) in inter-
merce and hence subject to the Power Com-
rate jurisdiction under Part II of the Act.
e terms of the Act on which jurisdiction is
not without ambiguity, judicial construction
t, as well as its legislative history, makes clear
ctness of this result, as we show at length in
infra.
ner not only denies that these sales are covered
II but, in addition, contends that, since these
of power generated at licensed projects, the
hich the states may, if they can, regulate under
ese sales are in no event subject to regulation
rt II by the Power Commission. We show in
, *infra,* that this contention is without merit
ecently been rejected by the Courts of Appeals
other circuits. *Safe Harbor Water Power*
PC, 179 F. 2d 179 (C.A. 3), certiorari denied,
957; *Pennsylvania Water & Power Co.* v.
. F. 2d .... (C.A.D.C. July 3, 1951), certio-
ted February 4, 1952.

I. The Sales to the Navy Are Regulable By the Federal Power Commission Under Part I of the Federal Power Act Because They Are Sales in Interstate Commerce, Nevada Has Not Provided a Commission With Power to Regulate Such Sales, and California and Nevada Are Unable to Agree on Terms of Regulation.

Section 20, Part I, of the Federal Power Act provides an integrated plan for state and federal regulation of rates for power generated on federally licensed projects, whenever this power enters interstate commerce. State and federal jurisdiction are concurrent under this section, but are mutually complementary. When state regulation is inoperative federal control takes effect.

The conditions under which state regulation is inoperative may be either legal or practical. The first condition arises when one of the states has failed to provide by law for a regulatory agency. The second condition arises when, although the states have provided regulatory agencies with appropriate authority, these agencies are unable to agree on rates or other terms of service.

We shall show that federal regulation is clearly proper in the circumstances of this case, because (a) the power sold by petitioner to the Navy is in interstate commerce and (b) state regulation is inoperative, owing to (1) the failure of Nevada to provide a commission with jurisdiction over sales of this type, and (2) the inability of California and Nevada to agree.

itial applicability of Section 20 depends, by , on whether the licensed power enters inter- merce. We think it is clear beyond question power bought by the Navy does pass in inter- merce. The power is generated in petitioner's Northern Division plants, or, in part, pur- om the City of Los Angeles. Much of it flows ts of petitioner's main transmission line from Creek to Leevining. All of it flows over some the 55,000 volt line from Leevining to Mill here it is switched to the Navy lines and passes n into Nevada.

s a journey in interstate commerce. Indeed t of the journey alone which takes place on r's lines is in interstate commerce, for it is led that one who transports a commodity on ion of a journey over state lines is transport- interstate commerce, even though that portion burney takes place wholly within one state. *Daniel Ball,* 10 Wall. 557. Ownership of the sion lines at the state border is immaterial. k that the decisions in *Jersey Central Power Co.* v. *FPC,* 319 U.S. 61, and in *FPC* v. *East s Co.,* 338 U.S. 464, holding that electric and panies operating wholly within single states ng power transmitted across state lines are in e commerce, are controlling in this aspect of

that one of the purchasers is the Government free petitioner from regulations otherwise ap It is petitioner, not the Government, who regulated. Cf. *Penn Dairies* v. *Milk Contro* 318 U.S. 261. Furthermore Section 201(c) of defines energy as transmitted in interstate c if it is transmitted from a state to any poin the state. This definition, which is merely a formulation of the judicially established defi interstate commerce, obviously covers petition to the Navy.

B. Nevada Has Not Provided a Commission With Power the Sales to the Navy; In Any Event, Nevada and Cali Been Unable to Agree Over Regulation of These Sale

It is clear, therefore, that Section 20 is the a section of the Act.[2] Section 20 provides, in ap circumstances, for either federal or state re We think that federal regulation is appropria case. Under Section 20 federal regulation operative when either of two events occurs: (1 ever any of the states directly concerned has vided a commission or other authority to en requirements of such section within such state when "such states are unable to agree throu properly constituted authorities on the servi rendered or on the rates or charges of payme for."

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[2] Petitioner contends that Section 19 is applicable, be tioner's project licenses incorporate the provisions of

ıa has no duly constituted commission with any
ver wholesale rates, even within Nevada. More-
en if the Public Service Commission of Nevada
h power, it has evinced and acted upon its
ıat it lacked this power. This belief, acted
nounts to an "inability to agree" within the
; of the statute.

e Public Service Commission of Nevada has no
y to regulate petitioner's sales to the Navy.
clear in the first place from a mere reading of
utes defining the jurisdiction of the Public
Commission, Nev. Comp. L. (1929) § 6100,
). 35. The Public Service Commission is
risdiction over "public utilities." Nev. Comp.
) § 6100, *infra,* p. 35. "Public utilities" are
to include plants within the state distributing
ty, Nev. Comp. L. (1929) § 6106, *infra,* p. 35.
petitioner is not within the state, it is not
he jurisdiction of the Nevada Commission.[3]
gnificantly, however, the Nevada statutes ex-
exempt sellers at wholesale from the jurisdic-
he Public Service Commission. Section 6147 of
piled Laws, *infra,* p. 36 authorizes public utili-
ıy electricity from other suppliers, and Section
fra, p. 36 subjects the purchase contracts to
l of the state commission. But Section 6149
37 expressly provides that in no circumstances
e seller be deemed to be a public utility or be
to the jurisdiction of the Nevada Commission.

has provided no commission with power to adn
the provisions of Section 20 of the Federal Pow
as they apply to petitioner's sales of power to th
Since the Navy resells part of the power it bu
petitioner, as we show at length, *infra,* pp. 21-2
tioner is in the position of a wholesaler exer
Nevada law, from the jurisdiction of the Nevad
mission.

2. As we have indicated, the failure of Ne
endow its Public Service Commission with au
to regulate wholesale dealings in power is itse
cient to bring petitioner within the ambit of
jurisdiction. But the second condition of Sec
making federal control appropriate, has also be
for the California and Nevada Commissions ha
unable to agree on rates. FPC so found, and i
ing, being supported by substantial evidence, n
be controverted in this Court. *Universal Camer*
v. *NLRB,* 340 U.S. 474; *FPC* v. *Hope Natural G*
320 U.S. 591.

The Nevada Commission never undertook reg
jointly with California. The Chairman of the
Commission was present at the hearing below,
fused to enter an appearance (R. 153-154)
Nevada Commission was given an opportunit
a party to the joint hearing, as the Nevada laws
(Nev. Comp. L. (Supp. 1941) § 6167.12), but it
this opportunity, stating that Nevada prefe
await the outcome of the hearing below (R. 154

to the Nevada Public Service Commission, in-
that the Nevada Commission had no power
es charged by municipal corporations (R. 186-
-514). The fair inference from this evidence,
ss of the correctness of the opinion expressed
that the Nevada Commission believed itself
ss to act in this case; and, because it believed
owerless, it never undertook joint regulation
lifornia.[4] For this reason, also, petitioner's
a subsequent opinion of the Attorney General,
ng that the Nevada Commission had jurisdic-
retail rates, is immaterial (R. 126-131). The
goes to the Nevada Commission's state of
nd this does not appear to have changed.

s posture there was a clear inability to agree
ne meaning of Section 20. As the Third Circuit
d in *Safe Harbor,* commencement of negotia-
not a prerequisite of a failure to agree; it is
that time passes without any effective joint
Safe Harbor Water Power Corp. v. *FPC,* 179
9, 191-192 (C.A. 3). Moreover, events subse-
the commencement of proceedings for fed-
ulation by the Power Commission may be
ed in determining that no agreement can be
179 F. 2d at 192. In this case, no steps have
ken toward agreement since 1949, when these
ngs were instituted. These considerations, we

vidence deals with the question of agreement over the
ounty rates and is silent over the Navy rates, but we think

submit, point conclusively to a default by th
concerned, so that the jurisdiction of FPC ha
while attached under Part I of the Act.[5]

**II. The Federal Power Commission Has Jurisdiction O
tioner's Sales to the Navy Under Part II of the A
much as These Sales Are Sales for Resale in I
Commerce.**

Part II of the Act provides an independent b
FPC jurisdiction to require the filing of peti
rates. Part II was enacted to create jurisdicti
sales at wholesale in interstate commerce. One
purposes of this enactment was to fill in the
public utility regulation created when the dec
Public Utilities Commission v. *Attleboro Co.,* 2
83, denied to the states the power to regulate in
wholesale transactions. See Sen. Rep. No. 62
Cong., 1st Sess., pp. 17, 48; H. Rep. No. 131
Cong., 1st Sess. p. 7; *Connecticut Light & Po*
v. *FPC.,* 324 U.S. 515, 525-527; *Jersey Central*
& Light Co. v. *FPC.,* 319 U.S. 61. On the othe
the Act reserved to the states their control ove
sales, even though the sales were in interstat
merce. *Connecticut Light & Power Co.* v. *FPC*

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[5] It may be pointed out that, with respect to wholesale
only possible state regulation is regulation by agreemen
states concerned. The Constitution forbids unilateral
either state in the wholesale field. *Missouri* v. *Kansas Ga*
U.S. 298; *Public Util. Comm.* v. *Attleboro Co.,* 273 U.S.
the readiness of the California Commission to act is mean
this case. In the retail field an area remains in which
is free to regulate that part of an interstate operation w

nhandle Eastern Pipeline Co. v. *Comm.*, 332
07.

this background in view, it is possible to re-
ne textual ambiguities in Part II, and it clearly
s that petitioner's sales in this case are regulable
C under Part II. This is precisely the kind of
on that is exempt from state regulation and
Part II was meant to reach. We shall show in
tion these sales fall within the terms of Part II.
following section, Point III, *infra* pp. 27-33, we
ow that the fact that these sales are of power
ed at projects licensed under Part I does not
em out of the operation of Part II.

oner's Sales to the Navy Are Sales for Resale in Interstate Commerce.

provisions of Part II granting the Power Com-
the authority to regulate rates and to compel
g of schedules are Sections 205 and 206. These
s apply to "any * * * sale [by a 'public utility']
to the jurisdiction of the Commission". Peti-
oncedes that it is a "public utility",[6] and under
s 201 (b) and (d) conjointly, the Commission's
tion embraces sales of electric energy for resale
rstate commerce.

clear that petitioner's various Mono Basin facilities are
for *transmission* in interstate commerce, the first of the
ve bases of jurisdiction set forth in Section 201(b). Sec-
) defines such transmission as transmission from any point
to any point outside that state. This alone would give
Commission jurisdiction over these facilities and peti-

Since we have shown above, *supra,* pp. 15-16,
sales to the Navy are in interstate commerce
Central Power & Light Co. v. *FPC,* 319 U.S. 6
v. *East Ohio Gas Co.,* 338 U.S. 464) it remai
shown that these sales are sales at wholesale.
to that now.

Section 201(d) defines sales at wholesale as
any person for resale. On the average, some 1
each year's supply of energy was resold by th
to the business concessionaires and the occupan
public housing at the Hawthorne Naval Depo
tricity so sold to each such consumer is se
metered and each consumer is billed and is req
pay for the energy he consumed. To the extent
energy so delivered came from petitioner, peti
sales to the Navy were obviously for resale.

Petitioner contends that because the
between it and the Navy did not mention these
the transaction cannot be regarded as a sale fo
(Pet. Br. p. 67). But, it is clear that petitio
aware of these resales (See R. 560, 305-307)
enough that the sales be made with knowledg
uses to which the power was to be put; it is no
sary that the purposes of the sale be set ou
contract. The sales were "made with a view
* * * resale." See *Kalem Co.* v. *Harper Bros.,* 2
55, 62; cf. *Hartford Electric Light Co.* v. *FPC*
2d 953, 958-960 (C.A. 2) Certiorari denied, 3
741.[7] After all, the Power Commission's juri

dent upon the facts as they exist, and not upon
s used in contractual agreements which can be
to fit the whims or desires of either party.
oes it detract from the wholesale nature of pe-
s sales that not all of the energy purchased was
It is enough that any part of the power sold
resale. See *Connecticut Light and Power Co.*
324 U.S. 515, 520-521, 536.[8] Reference to the
ve purpose of "filling the gap" left by the *At-*
case eliminates any problem arising from the
mixed uses of the energy. In *Attleboro* the
ed the interstate energy both "for its own use
sale". 273 U.S. at 84. Thus such mixed sales
hin the "gap" left by that case, and it follows
gress meant the statute to cover them.

es to the Navy Do Not Come Within Any of the Exceptions of Section 201.

itioner urges that its sales to the United States
sales at wholesale within the meaning of the
ause Section 201(d) defines sales at wholesale
o any *person* for resale, and the United States
person. This contention it seeks to support by

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er Commission's finding that the sales were at wholesale.
easonable inference from the evidence; and, the Power
n having drawn this inference on the basis of substantial
he finding should not be set aside.

o not find that Congress has conditioned the jurisdiction
nmission upon any particular volume or proportion of
energy involved, and we do not think it would be appro-

reference to Section 3(4) and Section 201
latter of which says that the provisions of Part
not apply to the United States, a state, or a
subdivision of a state, or other governmental b

The argument is specious. The exemption
United States is from the regulatory burdens
Act, not from such rate benefits as may accr
from the regulation of petitioner's rates. In sh
exemption means only that the United States i
be deemed a public utility. The "provisions"
II, from which governmental bodies are excep
provisions for regulation of public utilities. Th
thrust of the Act is toward regulating the s
wholesale, and not the buyer. The United S
only the buyer of the wholesale power.

This view is supported by several conside
First, the contrary reading urged by petitione
consistent with other provisions of the Act.
ample, Section 306 allows "any person, State,
pality, or state commission" aggrieved by an
of a licensee or public utility to apply to FPC
dress. This indicates that the benefits to buye
regulation under Part II must accrue to gover
bodies as well as to private persons—the exact
tion which petitioner's argument attempts to

The verbal problem presented by this conte
petitioner's can give no real difficulty, so long
recognized that the entire thrust of Part II is
lating public utilities. What is a public utilit
fined in Section 201(e); Section 201(f) defines

ances where the United States sells electricity
e, its rates are not regulable by FPC under
But none of these provisions bears any rel-
purchases by the United States. The Act was
ot aimed at this aspect of the transaction.[9]

tioner also argues that its California facili-
l in the interstate transmission and sale to
, are also used for "local distribution" in Cali-
nd are therefore exempt under Section 201(b),
cepts facilities used in local distribution (Pet.
8). The fallacy in this argument lies in the
of "local distribution." We think it is clear
distribution in this provision means no more
s of energy at retail, and the transmission fa-
ere involved which, as we have shown *supra,*
are used for transmission of energy in inter-
merce, are obviously not used solely for local
tribution.

rticular facilities which petitioner asserts are
local distribution consist of the 55,000 volt
sion line from Leevining to Mill Creek (See R.

as consistently construed the word "person" in Section
including governmental bodies, despite the exemption
201(f), and the definition of "person" in Section 3(4)
i.e., "an individual or a corporation"). Thus, sales at
o municipalities have been held regulable. *Otter Tail*
2 F.P.C. 134; *Los Angeles* v. *Nevada-California Electric*
P.C. 104; *Otter Tail Power Co.,* Opinion No. 186 (Nov.
Michigan-Wisconsin Power Co., Opinion No. 213 (May
Interstate Light & Power Co. & Wisconsin Power &
Opinion No. 215 (July 12, 1951). This consistent ad-

116). This Leevining-Mill Creek line, which, I recalled, serves the Navy and Mineral County Mill Creek, is also used as a "general servic from which power is apparently tapped to s towns of Bridgeport, Leevining, Garbutt Mine summer resort of June Lake (R. 181; see p. 62). While there is no evidence in the rec closing what local connections are involved in p the service to these communities, it is clear th connections must involve tap lines from the 55 line, and transformers which step down the to a level usable in distribution to private custo the power cannot be distributed directly into homes at the very high long-distance transmiss of 55,000 volts.

This fact is crucial, as was held in *FPC* v. *E Gas Co.*, 338 U.S. 464. The Supreme Court th

> But what Congress must have meant by ties" for "local distribution" was equip distributing gas among consumers withi ticular local community, not the high-press lines transporting the gas to the local ma U.S. at 469-470)

The situation is analogous here. This is clear legislative purpose of providing federal contr the point where the Constitution permits stat tion to begin—the retail level. This is the "fi gap" purpose of the Act. It is clear that,

California could not, under the *Attleboro* regulate it, to the extent that it is used in con- ith transmission or sales for resale in inter- merce, and hence it falls within FPC juris- See also *Connecticut Light & Power Co.* v. U.S. 515, 534.

rence to the legislative purpose of "filling also reveals the error in petitioner's further n that it is exempted by the proviso that Part not deprive a state of "its lawful authority cised" over interstate transportation of en- titioner's argument is that California has law- rity under Part I of the Act, because peti- a licensee under Part I, and Section 20 gives authority over it. But, under the doctrine of , California has no "lawful authority" over lesale interstate sales. Its authority is limited retail. It may be that it has authority jointly ada by agreement; but, as we have shown, . 16-20, this authority is not "now exercised." rt, the purpose of the proviso against inter- ith state regulation was simply to reempha- im of restricting the application of Part II to holesale, leaving retail rate regulation where ays been, in the hands of the states. No ex- was intended for those having licensee status rt I.

act That the Energy Sold Is Generated at Projects ed Under Part I Does Not Operate to Exempt the

because the power so sold is generated at pr
censed under Part I.[10] The argument seems t
because the power is generated at projects
under Part I, the sales thereof are subject by
Section 20 to future state regulation—when t
can agree—and that this type of regulation
sistent with rate regulation by the Power Co
under Part II; further, that since the l
scheme of the Act is based on deference to t
the inconsistency must be resolved in favor
regulation under Part I.

1. This argument has been considered in gr
and has been rejected in even broader aspect
Courts of Appeals. *Safe Harbor Water Pow*
v. *FPC,* 179 F. 2d 179 (C.A. 3), certiorari de
U.S. 957; *Pennsylvania Water & Power Co.*
F. 2d (C.A.D.C. July 3, 1951),
granted February 4, 1952. The principles
nounced are fully applicable in this case.
fallacy in petitioner's position is its failure to
that a company may be both a licensee unde
and a public utility under Part II. We have
the preceding sections, that this is the situati

The qualifications for a licensee under Pa
production of electric energy in licensed pr
public lands or navigable streams, are qu
pendent of those for a public utility under Pa

[10] Even if petitioner were correct in this contention,
would not be improved, unless it were able to show

sion or sale at wholesale of electric energy in
e commerce. A company and its activities,
rly, as here, sales at wholesale in interstate
e of electric energy generated at a licensed
may be subject to regulation under Part I or
or both. If it happens to be both as is the fact
s is coincidental.

ess recognized this possibility. It also recog-
at regulation of a company which was both a
ility and a licensee could take place under Part
ll as Part I. Thus, the House Committee, in
vith certain administrative provisions of Part
ned it unnecessary to use both terms—licensee
ic utility—in a provision that was to apply to
who happened also to be public utilities. The
as that, if they qualified as public utilities, they
ered, whether or not they were also licensees.
ep. No. 1318, 74th Cong., 1st Sess., p. 31. Also,
sman of Part II, Dozier DeVane, Solicitor of
explaining the relationship of Part II to the
er of the Public Utilities Act of 1935, pointed
"among the operating companies"—*i.e.,* pub-
es—were a number of licensees under Part I.
rings before Senate Committee on Interstate
ce on S. 1725, 74th Cong., 1st Sess., pp. 233-234.
lear, therefore, that a company and its activ-
y be subject simultaneously to the regulatory
nents of both Part I and Part II. We recog-
t, in a particular circumstance, this might

rate regulation by the states results in an order
sistent with a Power Commission order in re
rates under Part II.

From this potential inconsistency petitioner
cludes that there is an implied exemption of
from Part II. But the conclusion is not wa
When Part II was passed in 1935, Part I was a
and reenacted. Act of August 26, 1935, c. 687,
863. Obviously the two Parts should be read t
with an attempt to construe them consistently
possible. And in the circumstances of this ca
is no inconsistency. In this case, as we have
supra, pp. 14-20, petitioner's rates for its sale
Navy are not subject to state regulation under
20. Under Section 20, by virtue of Nevada's f
provide a commission with power over wholes
and by virtue of Nevada's failure to agree w
fornia, the Power Commission has jurisdict
petitioner's rates to the Navy so that there ca
inconsistent orders. Inconsistency cannot ar
the states are prepared to agree on regulatio
Section 20 and actually issue rate orders under
tion. Until that happens it is not necessary
mine whether the statute is internally inconsis

---

[11] As the Third Circuit pointed out in *Safe Harbor,* e
states should undertake to regulate petitioner's rates und
20, this by no means assures an inconsistency, because th
for fixing rates is substantially identical under Section 20
under Part II. Under Section 20 rates must be "
nondiscriminatory, and just," while under Section 206

m the foregoing it is clear that there is no in-
ıcy between Part I and Part II of the Act, as
n this case. But even if the Court should feel
possibility of future conflicting state and fed-
ers renders the statute internally inconsistent
ce, and that the potential inconsistency must
ed, the correct resolution is not by construing
to exempt licensees from federal control. The
pproach is rather to read Section 20 to exclude
ilities from state control. Once again refer-
ne legislative history supports this conclusion.
ctment of Section 20 without amendment in
er the *Attleboro* case, implies that Congress
ot to extend state regulation under Section 20
tate wholesale rates—that is, to rates charged
lic utilities." *Attleboro,* which was decided
ars after the original enactment of Section 20,
ch jurisdiction to the states, and if Congress
nt to reopen it, Congress would have done so
nacting the section. Thus far, in this brief, we
umed for the sake of argument that the states
gulate wholesale rates under Section 20, where
ates involved were able to reach an agreement,
clearly no state could regulate unilaterally.
ch an interpretation is regarded as untenable,
f constitutional limitations as well as potential
in regulation, then—so far as wholesale sales
ate commerce are concerned—even joint regu-
the states must be deemed invalid. Section

the absence of congressional prohibition, to
retail sales in interstate commerce, but no mo

This view is consistent with the *Attleboro*
and the cases preceding it. It is consistent with
of filling the gap left by *Attleboro* with fede
lation. Moreover, nothing in the language of
20 suggests that Congress granted to the stat
powers than *Attleboro* left to them, and mu
legislative history suggests that Congress wa
confirming to the states the powers which th
constitutionally exercise. Congress could not
tended, in 1920 when Section 20 was first en
extend state regulation beyond its recognize
whatever these limits might ultimately pro
Hence Congress' provision for state regulat
have referred only to regulation within the
sphere of state authority—which turned out t
ited to retail interstate sales. For *Attleboro*
other cases defining these boundaries had not
decided. The 1935 reenactment without cha
firmed the dimensions of this sphere.

On the other hand, in enacting the public ut
tions of the Act—Part II—Congress was cl
tending federal regulation. It was extending
regulation into all the interstices which the sta
not reach. Part II, moreover, is the later le
All this strongly suggests that in any irrec
conflict between Part I and Part II it is the
and not the latter, which must give way. Un
a reading, the overlapping of jurisdictions is

energy at wholesale in interstate commerce,
ugh the energy involved is generated at a
censed under Part I, are to be regulated ex-
by the Federal Power Commission. We re-
owever, that since there is no overlapping of
ons in the circumstances of this case, the prob-
consistency need not be resolved now.

Power Commission's Order Is Substantively Valid.

l more may be said in answer to petitioner's
n that the Power Commission cannot require
ement" of petitioner's contract with the
cause the contract was terminated in accord-
its provisions (Pet. Br. pp. 68-71). A short
that the Commission's order does not require
ement" of the contract. The order provides,
the last rates under which sales were made to
, which happen to be the rates under the con-
iled as a rate schedule; second, that petitioner
om charging—without the Commission's ap-
ny rates other than those filed with the Com-
nd, third, that, so long as sales continue, they
t the rates so published until petitioner comes
wer Commission in a proper proceeding for an
which petitioner is free to do. As these
never previously been published, the order
logically prior step of requiring their publica-
ese requirements as to filing and changing of
form with the clear provisions of Sections 205
s well as with provisions of Section 20, which

Interstate Commerce Act, 24 Stat. 380, as am
U.S.C. 6(1), 6(3).

CONCLUSION

For the foregoing reasons it is respectfully s
that the order of the Federal Power Commissi
be affirmed.

HOLMES BALDRIDGE,
Assistant Attorney G

PAUL A. SWEENEY,
MELVIN RICHTER,
T. S. L. PERLMAN,
Attorneys,
Department of Jus

CHARLES GOODWIN,
Counsel.

GEORGE SPIEGEL,
Assistant Counsel,
Bureau of Yards and Docks,
Department of the Navy,
Of Counsel.

FEBRUARY, 1952

rtinent provisions of the Compiled Laws of 929 Edition, provide as follows:

100. Commission Created. The public serv- ommission is hereby created whose duty it be to supervise and regulate the operation naintenance of public utilities, as hereinafter d and defined, in conformity with the pro- ns of this act.

106. "Public Utility" Defined.—Excep- —Embraces All Corporations Furnishing ic Service.—Further Application of Term blic Utility." * * * "Public Utility" shall embrace every corporation, company, indi- l, association of individuals, their lessees, ees or receivers appointed by any court what- r, that now or hereafter may own, operate or ol any ditch, flume, tunnel or tunnel and age system, charging rates, fares or tolls, di- or indirectly, any plant or equipment, or any of a plant or equipment within the state for roduction, delivery or furnishing for or to persons, firms, associations, or corporations te or municipal, heat, light, power in any or by any agency, water for business, manu- ring, agricultural or household use, or sewer- ervice whether within the limits of municipal- towns, or villages or elsewhere; and the pub- rvice commission is hereby invested with full

and to the exclusion of the jurisdiction, r
and control of such utilities by any mun
town or village, unless otherwise provide

* * *

§ 6147. Public Utility Corporation M
chase Water or Electricity. Every per
pany, corporation, or association, whic
gaged in business in this state as a publi
shall have, and it is hereby given, the righ
chase water or electric current for its us
public utility from any other person or co
having for sale a surplus of such water o
current.

§ 6148. Must Apply to Public Serv
mission. Any public utility desiring to
such water or electric current for resale o
poses other than its own use shall file an
tion with the public service commission of
setting forth the terms and conditions of
posed purchase of such electric current
the person or corporation from whom s
chase is proposed to be made, the duratio
contract to purchase, and such other inf
relative thereto and in the possession of t
cant as the public service commission s
scribe. If the public service commission
it desirable in the public interest, that s
chase be made, it shall approve such ap
and upon such approval such public uti

5149. SELLER NOT DEEMED A PUBLIC UTILITY. AITH OF STATE PLEDGED. The person or cor- tion selling such water or electric current to public utility under such contract approved ne public service commission shall not thereby me, or be deemed to be, a public utility within neaning of any statute of this state, nor shall virtue of such contract be deemed to be in or subject to the jurisdiction of the public ice commission of Nevada in any respect what- er, nor shall it thereby be deemed to be in any e a public service corporation, or engaged in a ic service. The terms and provisions of this hall be taken and considered to be a part of such contract, and the faith of the State of ada is hereby pledged against any alteration, ndment or repeal of this act during the ex- ce of any such contract, or any extension eof, approved by the public service commis- of Nevada.